Avel Consultants Sdn Bhd & Anor v Mohd Zain Yusof & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C336 OF 1984
RICHARD TALALLA J
24 AUGUST 1995

Companies and Corporations — *Directors — Breach of directors' duties — Whether directors entitled to deduction of expenses incurred when accounting profits to companies*

Equity — *Account for profits — Directors — Fiduciary position — Whether expenses incurred in making profit could be deducted from account — Work was done for company while defendants were still directors and employees of company*

Evidence — *Proof of damage — Evidence must be led as to items of damages claimed — Not sufficient to merely state particulars of damage without proving them*

The plaintiffs were private companies incorporated in Malaysia. The first and second defendants were directors of the first plaintiff. The defendants were directors of the second plaintiff. On 13 September 1983, Fleet Group Sdn Bhd, which was later incorporated as Sistem Televisyen Malaysia Bhd (STMB), appointed the first plaintiff as its project manager and the second plaintiff as its consultant engineers. On 30 November 1983, the three defendants registered a partnership under the style of Perunding AJZ to carry on the same business as that of the plaintiffs. On 18 November 1983, STMB issued a letter to the first plaintiff terminating its services on the ground that certain personnel of the first plaintiff would be resigning. On 5 December 1983, the defendants' partnership, Perunding AJZ, was appointed as consultants of STMB in place of the first plaintiff. At that time, the defendants were still directors of the plaintiffs but the appointment was not disclosed to the plaintiffs. The plaintiffs found out on 27 January 1984 and filed an action against the defendants on 15 February 1984. The plaintiffs obtained summary judgment pursuant to O 14 of the Rules of the High Court 1980 against the defendants with damages to be assessed by the senior assistant registrar. The defendants appealed against the senior assistant registrar's assessment on the ground that they were entitled to deduct expenses incurred when accounting profits to the plaintiffs. The plaintiffs cross-appealed on the ground that assessment should be based on the total sum of RM5,654,699.24 which was received by the defendants from STMB for all phases of the project between 25 January 1984 and 5 June 1992.

Held, dismissing the appeals:

(1) The accounting period for assessment was between 30 November 1983 and 1 March 1984. The only contract secured

by the defendants during that period was the appointment by STMB on 5 December 1983, and the total fees received by the defendants from STMB in respect of phase 1 of the project was RM1,119,867.25. The contract was for the first phase only and the cross-appeal could not be allowed.

(2) The directors were fiduciaries being either directors or employees of the plaintiffs. The work in respect of which the defendants were paid by STMB was done when the defendants were still directors or employees of the plaintiffs. They could not therefore claim deductions for personal professional fees of RM197,131 for work done for STMB by the plaintiff companies.

(3) It was not clear whether the facilities including lay staff utilized in earning the amount paid by STMB were the plaintiffs' or defendants' and deductions would not be allowed.

(4) The expenses which the defendants said should be deducted were inherently unreliable because (a) expenses for the second phase of the project were to be much less than those of the first phase; (b) the accountant who prepared the account for this litigation was not called to support it; and (c) expenses claimed were the entire operational expenses not limited to this project.

(5) The defendants had to prove each and every item in the account was reasonably and properly incurred. They did no such thing and did not call the maker of the account to testify. The failure to lead evidence of the items was tantamount to the defendants throwing these items at the head of the court and expecting the court to make an award.To have required the plaintiffs to challenge mere items hurled at the court in this way was again tantamount to placing on the plaintiffs the onus of establishing the defendants' claim to a deduction. That was something the defendants could not lawfully do.

[Bahasa Malaysia summary

Plaintif adalah syarikat-syarikat persendirian yang telah diperbadankan di Malaysia. Defendan pertama dan kedua merupakan pengarah plaintif pertama. Defendan-defendan juga adalah pengarah plaintif kedua. Pada 13 September 1983, Fleet Group Sdn Bhd, yang kemudiannya diperbadankan sebagai Sistem Televisyen Malaysia Bhd ('STMB'), melantik plaintif pertama sebagai pengurus projeknya dan plaintif kedua sebagai jurutera perundingnya. Pada 30 November 1983, ketiga-tiga defendan telah mendaftarkan satu perkongsian di bawah nama Perunding AJZ untuk menjalankan perniagaan yang sama seperti perniagaan plaintif. Pada 18 November 1983, STMB telah mengeluarkan sepucuk surat kepada plaintif pertama menghentikan perkhidmatannya atas alasan bahawa beberapa pekerja tertentu

plaintif pertama akan berhenti kerja. Pada 5 Disember 1983, perkongsian defendan-defendan, Perunding AJZ, telah dilantik sebagai perunding kepada STMB menggantikan plaintif pertama. Pada masa itu, defendan-defendan masih menjadi pengarah plaintif tetapi perlantikan itu tidak diberitahu kepada plaintif. Plaintif mendapat tahu fakta itu pada 27 Januari 1984 dan memfailkan satu tindakan terhadap defendan-defendan pada 15 Februari 1984. Plaintif mendapat penghakiman terus mengikut A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap defendan dengan ganti rugi yang akan ditaksirkan oleh penolong kanan pendaftar. Defendan merayu terhadap taksiran penolong kanan pendaftar atas alasan bahawa mereka berhak menolak perbelanjaan apabila membuat akaun keuntungan kepada plaintif. Plaintif pula merayu balas atas alasan bahawa taksiran sepatutnya berdasarkan jumlah RM5,654,699.24 yang telah diterima oleh defendan dari STMB untuk semua fasa projek itu di antara 25 Januari 1984 dan 5 Jun 1992.

Diputuskan, menolak rayuan-rayuan itu:

(1) Tempoh perakaunan untuk taksiran adalah di antara 30 November 1983 dan 1 Mac 1984. Kontrak tunggal yang diperolehi oleh defendan dalam tempoh itu adalah perlantikan oleh STMB pada 5 Disember 1983, dan jumlah fee yang diterima oleh defendan dari STMB berkenaan dengan fasa 1 projek itu adalah RM1,119,867.25. Kontrak itu adalah untuk fasa 1 sahaja dan rayuan balas tidak boleh dibenarkan.

(2) Pengarah-pengarah merupakan fidusiari, sebagai pengarah atau pekerja plaintif. Kerja yang berkenaan dengannya defendan dibayar oleh STMB telah dijalankan semasa defendan masih menjadi pengarah atau pekerja plaintif. Oleh itu mereka tidak boleh menuntut tolakan untuk fee profesional persendirian sebanyak RM197,131 untuk kerja yang dijalankan untuk STMB oleh syarikat plaintif.

(3) Adalah tidak jelas sama ada peralatan termasuk pekerja yang digunakan untuk mendapat jumlah yang dibayar oleh STMB adalah kepunyaan plaintif atau defendan. Oleh itu tolakan tidak dibenarkan.

(4) Perbelanjaan yang defendan katakan patut ditolak tidak boleh dipercayai kerana (a) perbelanjaan untuk fasa 2 projek itu seharusnya kurang daripada perbelanjaan untuk fasa 1; (b) akauntan yang menyediakan akaun untuk tindakan ini tidak dipanggil untuk menyokong akaun itu; dan (c) perbelanjaan yang dituntut adalah keseluruhan perbelanjaan operasi yang tidak dihadkan kepada projek itu.

(5) Defendan mesti membuktikan setiap perkara di dalam akaun itu telah dibelanjakan dengan munasabah dan patut. Mereka tidak berbuat demikian dan tidak memanggil orang yang menyediakan akaun itu untuk memberi testimoni. Kegagalan

mengemukakan keterangan berkenaan perkara-perkara itu adalah sama dengan defendan meletakkan perkara-perkara itu di depan mahkamah dan mengharapkan mahkamah membuat satu award. Jika plaintif dimestikan mencabar perkara-perkara yang semata-mata diletakkan di depan mahkamah dalam cara ini, itu adalah sama dengan meletakkan pada plaintif beban membuktikan tuntutan defendan untuk tolakan. Ini adalah satu perkara yang tidak boleh dibuat oleh defendan di segi undang-undang.]

Notes

For cases on fiduciary duties of directors, see 3 Mallal's Digest (4th Ed, 1994 Reissue) paras 85–92.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177 (refd)

Guinness plc v Saunders [1990] 2 AC 663; [1990] 2 WLR 324; [1990] 1 All ER 652 (refd)

Hospital Products Ltd v United States Surgical Corporation & Ors (1984) 58 ALJR 587 (folld)

Lee Sau Kong v Leow Cheng Chiang [1961] MLJ 17 (refd)

O'Sullivan & Anor v Management Agency And Music Ltd & Ors [1985] QB 428; [1984] 3 WLR 448; [1985] 3 All ER 351 (refd)

PP v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)

Phipps v Boardman & Ors [1964] 1 WLR 933; [1964] 2 All ER 187 (distd)

Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)

Regal (Hastings) Ltd v Gulliver & Ors [1967] 2 AC 134; [1942] 1 All ER 378 (distd)

Legislation referred to

Companies Act 1965 s 131(1)

Rules of the High Court 1980 O 14

David Morais and *Gopal Sreenevasan* (*M David Morais*) for the plaintiffs.

Cecil Abraham and *Dhinesh Bhaskaran* (*Dulip Singh & Co*) for the defendants.

Richard Talalla J: This is an appeal by the defendants against an assessment made by the learned senior assistant registrar (the SAR) pursuant to the order of the Federal Court made in Federal Court Civil Appeal No 135 of 1984 on 1 August 1985. The relevant part of the Federal Court order was the sequel to the plaintiff's application pursuant to O 14 of the Rules of the High Court 1980 for summary judgment

against the defendants, all set out and reported in [1985] 2 MLJ 209. The relevant part of the Federal Court order reads as follows:

> ... This court doth declare that the respondents abovenamed had acted in breach of the fiduciary duty owed to the appellants and it is further ordered that the senior assistant registrar of the High Court at Kuala Lumpur do inquire into and assess the damages payable by the respondents to the appellants by reason of the breach as aforesaid and it also ordered that the respondents do pay to the appellants the damages so assessed And it is further ordered that the respondents do account to the appellants all income in respect of all contracts for services secured by them or Perunding AJZ between 30 November 1983 and the first day of March 1984 and it is further ordered that the senior assistant registrar of the High Court at Kuala Lumpur do inquire into the account aforesaid and determine the sum payable by the respondents or Perunding AJZ to the appellants and it is also ordered that the parties be and are hereby at liberty to apply to the High Court at Kuala Lumpur for such directions as may from time to time be necessary and it is further ordered that the costs of this appeal and proceedings in the court below be paid by the respondents to the appellants and it is lastly ordered that the deposit of $500 (Ringgit Five Hundred Only) paid by the appellants as security for costs of the appeal be refunded to the appellants.

The plaintiffs cross appealed against the SAR's assessment. For the purpose of the hearing of the appeals the plaintiffs' solicitors filed a statement of agreed facts and issues reading as follows:

Agreed facts

(1) The plaintiffs are private limited companies incorporated in Malaysia.

(2) The defendants, at the material time, were directors of the second plaintiff.

(3) Additionally, the first and second defendants were directors of the first plaintiff.

(4) The plaintiffs were and are in the business of engineering consultancy and advisory services.

(5) On 13 September 1983, a company known as Fleet Group Sdn Bhd on behalf of a company yet to be incorporated, and subsequently known as Sistem Televisyen Malaysia Berhad (STMB) appointed the first plaintiff as its project managers and for specialised input. The project was for the establishment and running of the TV3 channel.

(6) The appointment placed no limitation as to the contract period save that termination was provided in the event of resignation of key personnel (sic) or breakup in the partnership (sic) of the first plaintiff.

(7) The second plaintiff, by the same letter of appointment, was appointed as the consultant engineers for the project.

(8) On 30 November 1983, while the three defendants were still directors of the first plaintiff and the first and second defendants were directors of the second plaintiff, the three defendants registered a partnership under the style of Perunding AJZ to carry on the same business as that of the plaintiff. At that time, the first defendant was the managing director of the first plaintiff.

(9) The establishment of Perunding AJZ was done without the knowledge or consent of the plaintiffs.

(10) On 1 November 1983, the first defendant issued a letter in the name of the first plaintiff, to STMB informing them that certain key personnel of the first plaintiff would be resigning and leaving the continuation of the plaintiffs' consultancy services in the discretion of STMB.

(11) This letter was issued prior to the resignation of the personnel named in the letter.

(12) On 18 November 1983, STMB issued a letter to the first plaintiff terminating its services and citing the grounds in the first defendant's letter of 1 Novembver 1983 as the reason for the termination.

(13) On 5 December 1983, the defendants' partnership, Perunding AJZ, were appointed as consultants for the TV3 project by STMB, in the place of the first plaintiff.

(14) At the time of the appointment of Perunding AJZ, the defendants still maintained their respective positions on the board of the plaintiff.

(15) The appointment of Perunding AJZ by STMB was not disclosed to the plaintiffs.

(16) The defendants' breach of their fiduciary duties was discovered on 27 January 1984 on which day, they were suspended from their duties.

(17) The plaintiffs filed this action on 15 February 1984.

(18) On 1 April 1985, the Federal Court entered interlocutory judgment for the plaintiffs with damages to be assessed. The accounting period for the assessment is in respect of 'all contracts for services secured by them [the defendants] or Perunding AJZ between the 30th day of November 1983 and the first day of March 1984'.

(19) The only contract secured by the defendants within the accounting period was the appointment by STMB on 5 December 1983.

(20) Between 25 January 1984 and 5 June 1992, the defendants have received a total of RM5,654,699.24 in income from STMB inclusive of fees for phases 1, 2, 3 and 4 of the TV3 project. The first defendant estimates an additional RM1,000,000 payable for the completion of phase 4 of the project.

(21) The total fees received by the defendants from STMB in respect of phase 1 of the project was RM1,119,867.25.

Issues

1(a) Whether the defendants are liable for all income earned in respect of phases 1, 2, 3 and 4 from the TV3 project regardless of when the income was earned? or

(b) Whether the defendants are only liable in respect of income earned from phase 1 of the TV3 project? or

(c) Whether the defendants are only liable for income earned and received in respect of the phase 1 of the project during the accounting period, ie 30 November 1983 to 1 March 1984?

2(a) Whether the defendants are entitled to set off their expenses against any income held to be accounted? and if so

(b) Whether on the evidence disclosed in this case, the defendants are entitled to set off any expenses?

It being admitted that the only contract secured by the defendants within the agreed accounting period is the appointment of STMB on 5 December 1983 and that appointment being in the form of a letter of that date addressed to Perunding AJZ by STMB, I set out hereunder the contents of the letter:

> Attention: Encik Mohd Zain Yusoff
>
> Dear Sirs,
>
> STMB – TV – Network Three Project
> Appointment of consultant
>
> We are pleased to inform you that with immediate effect you have been appointed as consultants for the following stages of work in respect of the abovementioned project:
>
> A Scope of work
>
> 1 Study and review and modify preliminary report and detailed design (if any) on the project.
>
> 2 Provide specialist input for the design and implementation of the colour TV system for the studio complex and the nationwide coverage of the Third Network.
>
> 3 Conduct any additional studies in relation to successful implementation of the national coverage, subject to our approval.
>
> 4 Provide project management and co-ordination services and act as project leader for all other consultancy services.
>
> B Professional fees
>
> The basis of fees are as follows:
>
> Project Management — 1% of total project contract cost
> Specialist Input — 6% of total equipment contract cost
>
> Your overall fees shall be the total computed value based on above, less RM350,000.

A Terms of payment

The terms of payment are as follows:

1 Mobilisation 5%
2 Review of report 15%
B 3 Design 40%
4 Tender and award 10%
5 Implementation 20%
6 Final acceptance 10%

Termination of agreement

C

Please take note that in the event of resignation of any key personnel involved in the Channel Three Project and/or breakup in partnership in Perunding AJZ which will affect the continuity of service to ourselves, you are mandatorily required to notify us and we reserve the right to suspend and terminate your services. Any expenses incurred by us in the
D reappointment of such consultancy services, to ensure smooth and continuous service of the Channel Three Project will be chargeable to you.

Should you agree with the above terms, you are requested to prepare and submit a draft consultancy agreement for our consideration.

E The letter does not contain any express provision as to the duration of the contract and I could not deduce from its terms a duration in excess of phase 1.

If the contract was vague and uncertain as to its duration, the evidence led before the SAR was as nebulous. Set out hereunder is the relevant evidence of the general manager of Fleet Group Sdn Bhd:

F

Because of the licence we got from the government. We were not certain what our scope of coverage was, so when we appointed consultant or personnel for our project based on ad hoc basis. So when we mention phase 1 we were not definite how many stages there were, our target was to get the station broadcasting in 1984 in time for the 1984 Olympics.

G There wasn't a formal contract. Only in letter of appointment. When Fleet got the licence from the government, Sistem Televisyen Malaysia Berhad did not exist. The task force was an entity created by Fleet Group Sdn Bhd with the specific purpose of setting up a broadcasting station.

Yes, the appointment of Avel and AJZ was based on Mohd Zain. Yes, if Zain were to remain in Avel I will not appoint AJZ. Yes, I will
H have not terminated Avel if Zain were still there. I would follow him wherever he went.

The first defendant's evidence was no more enlightening. The relevant parts are as follows:

I

Yes, this is the letter of appointment by Fleet Group. Originally they wanted me to undertake the job personally. But as this project involves more than one person and more than one discipline and I was also employed by Elmec, I proposed that the appointment also be given to

Elmec because it was a specialised consultant company dealing with engineering works in which I had some major interest.

The earlier appointment was a very loose appointment and was given on a job to job basis. The new management called for international bidders for this project. They were eight international bidders based on our records.

It being agreed as stated above that the only contract secured by the defendants between 30 November 1983 and 1 March 1984 was the appointment by STMB on 5 December 1983, and the total fees received by the defendants from STMB in respect of phase 1 of the project was RM1,119,867.25, the SAR assessed the damages in that sum in gross. The plaintiffs' cross-appeal is for the total sum of RM5,654,699.24 which, as admitted above, the defendants received by way of income from STMB for all four phases between 25 January 1984 and 5 June 1992. For the reasons abovestated, I find as the SAR did that the duration of the contract was for the first phase only and accordingly the cross-appeal cannot be allowed.

As to the defendants' appeal, they argue that the plaintiffs are entitled to the net profit only on the income of phase 1 that is to say RM1,119,867.25 as in fact assessed by the SAR less a number of deductions amounting to RM527,747 leaving a balance of RM181,471 being the said net profit, all as set out in a profit and loss account of Perunding AJZ as set out hereunder:

Profit and Loss Account for the period 1 December 1983 to 28 February 1984

Income	
Professional fees received	RM709,218
Operating expenses	
Professional fees	197,131
Partners' salaries, allowance and bonus	87,000
Staff salaries and bonus	74,003
Legal fees	47,660
Travelling	46,998
Rental	12,700
Motor vehicle expenses	7,682
Entertainment	7,566
Office stationery and supplies	7,307
Telephone charges	6,789
Photocopying	5,556
Transport charges	4,036
Casual wages	3,601
Accounting fees	3,449
Telex charges	3,051
Upkeep of office	2,200
Service charge	2,000
Electricity and water	1,904
Technical supplies	1,632
Staff refreshment	1,600

Professional subscription	1,288
Security services	800
Postage	723
Periodicals and publications	433
Bank charges	52
Miscellaneous	586
Total Operating Expenses	527,747
	RM181,471

The defendants' argument abovestated was based on two cases, namely, *Phipps v Boardman & Ors* [1964] 1 WLR 993; [1964] 2 All ER 187 and *Regal (Hastings) Ltd v Gulliver & Ors* [1967] 2 AC 134; [1942] 1 All ER 378. In *Regal (Hastings)*, the appellant company was seeking to recover from its directors and solicitor profits made by them upon the acquisition and sale by them of shares in a subsidiary company. It had been resolved that Regal should apply for only 2,000 shares, it being agreed that 2,000 pounds was the total sum which Regal could find. Each of the directors, except the chairman, agreed to apply for 500 shares, the chairman saying he would find people to take up 500 shares. The solicitor was invited to apply for 500 shares and he did so with the full knowledge and consent of Regal. The chairman found his people. The shares were duly paid for and allotted. Shortly afterwards these shares were sold at a substantial profit. The judges in the House of Lords allowed Regal's appeal against the directors except the chairman and the solicitor. At pp 144 and 145 [[1942] 1 All ER 378 at p 386], Lord Russell of Killowen said:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action.

It having been found on the evidence that the chairman having made no profit for which he was accountable, the appeal against him was dismissed, as it was as against the solicitor, Lord Russell holding at p 152 [p 391 of the All ER] that he knew of no principle or authority which would justify a decision that a solicitor must account for profit resulting from a transaction which he has entered into on his own behalf, not merely with the consent, but at the request of his client. The second case was one in which B, a solicitor to a will trust and a beneficiary, neither being trustees, had obtained a controlling interest in a company in which the trust had a substantial shareholding, as a result of purchasing shares in the company. The solicitor was able to do this by his own skill and effort and recourse to the trust's shareholding. In consequence he made profit for himself and the trust. Wilberforce J, as he then was, in *Phipps v Boardman* held at p 1018 [[1964] 2 All ER 187 at p 208] as follows:

> Moreover, account must naturally be taken of the expenditure which was necessary to enable the profit to be realised. But, in addition to expenditure, should not the defendants be given an allowance or credit for their work and skill? This is a subject on which authority is scanty; but Cohen J in *Re Macadam, Dallow and Moscrop v Codd* [1946] Ch 73, 82 gave his support to an allowance of this kind to trustees for their services in acting as directors of a company. It seems to me that this transaction, ie the acquisition of a controlling interest in the company, was one of a special character calling for the exercise of a particular kind of professional skill. If Boardman had not assumed the role of seeing it through, the beneficiaries would have had to employ (and would, had they been well advised, have employed) an expert to do it for them. If the trustees had come to the court asking for liberty to employ such a person, they would in all probability have been authorised to do so, and to remunerate the person in question. It seems to me that it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it.

In *O'Sullivan & Anor v Management Agency And Music Ltd & Ors* [1985] QB 428; [1984] 3 WLR 448; [1985] 3 All ER 351, *Phipps v Boardman* was applied and in respect of which Dunn LJ said:

> That was a case where trustees, or in the case of *Boardman* a solicitor to the trustees, of a will bought on their own behalf shares in a company using information which they had acquired in their capacity as trustee, since the trust held some shares in the company which enabled the trustees to obtain confidential information as to its financial state. The trustees were held liable to account for the profit they had made from the transaction. The case shows the strictness of the rule, since no moral blame attached to the trustees, who had consulted their fellow trustee and obtained their consent from all save one who was senile. In recognition of this the court ordered that they should be given credit not only for their expenses but also given a liberal allowance for their skill and work in producing the profit.

In that case itself, O'Sullivan, who was a young and unknown composer and performer of popular music wholly inexperienced in business matters, became closely acquainted and entered into an exclusive management agreement with the third defendant, M, an internationally recognised manager, producer and performer. M operated through, and was a substantial shareholder in, a parent company, the first defendants who were music agents, and two subsidiary companies, the second and fifth defendants, who were publishing and recording companies. In reliance upon M, O'Sullivan entered into agreements, inter alia, with the publishing and recording companies and into a contract of employment with the fourth defendant which was another associated company which had been incorporated to receive artistes' foreign earnings. O'Sullivan went on to achieve considerable recognition and success. He subsequently together with his company that was incorporated to receive his United Kingdom earnings brought an action seeking, inter alia, a declaration that the agreements were unenforceable on the ground that they were obtained by undue influence. The plaintiffs

succeeded at first instance and effectively also on appeal inasmuch as the agreements were found to have been obtained by undue influence and to be voidable. The Court of Appeal went on to hold that although the parties could not be restored to their original position, the court had jurisdiction, where a contract had been obtained by undue influence, to make such orders as were practically just between the parties; that, in the circumstances, it was just to order the agreements between the first plaintiff and the defendants to be set aside and to order the defendants to account for their profits but credit should be given to them for their skill and labour in promoting the plaintiff and making a significant contribution to his success; that, accordingly, the defendants were entitled to a reasonable remuneration including a small profit element but one that was considerably less than they would have received had the first plaintiff obtained independent advice before entering into agreements with them.

Guinness plc v Saunders [1990] 2 AC 663; [1990] 2 WLR 324; [1990] 1 All ER 652 was a case in which Guinness had obtained judgment against the appellant Ward, who was one of its directors, who admitted to receiving 5.2m pounds as remuneration authorised by three men who formed a committee of its board of directors but not the board itself. The judges of the House of Lords dismissed the appeal. In doing so Lord Templeman referring to *Phipps v Boardman* said at pp 335 and 336:

> The purchase of a controlling interest might have turned out badly and in that case the solicitor and the purchasing beneficiary would have made irrecoverable personal losses. In these circumstances it is not surprising that Wilberforce J decided that in calculating the undeserved profit which accrued to the trust estate there should be deducted a generous allowance for the work and trouble of the solicitor and purchasing beneficiary in acquiring the controlling shares and restoring the company to prosperity. *Phipps v Boardman* decides that in exceptional circumstances a court of equity may award remuneration to the trustee. Therefore, it is argued, a court of equity may award remuneration to a director. As at present advised, I am unable to envisage circumstances in which a court of equity would exercise a power to award remuneration to a director when the relevant articles of association confided that power to the board of directors. Certainly, the circumstances do not exist in the present case. It is in this respect that s 317 of the Companies Act 1985 is relevant. By that section:
>
> (1) It is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company ...
>
> (7) A director who fails to comply with this section is liable to a fine ...

The equivalent is s 131(1) of the Companies Act 1965. In the same case Lord Goff said at pp 342 and 343 [[1990] 2 AC 663 at p 701; [1990] 1 All ER 652 at pp 667–668]:

> Not only was the equity underlying Mr Boardman's claim in *Phipps v Boardman* clear and, indeed, overwhelming; but the exercise of the jurisdiction to award an allowance in the unusual circumstances of that case could not provide any encouragement to trustees to put themselves in a position where their duties as trustees conflicted with their interests. The present case is, however, very different. Whether any such an allowance might ever be granted by a court of equity in the case of a director of a company, as opposed to a trustee, is a point of which has yet to be decided; and I must reserve the question whether the jurisdiction could be exercised in such a case, which may be said to involve interference by the court in the administration of a company's affairs when the company is not being wound up. In any event, however, like my noble and learned friend, Lord Templeman, I cannot see any possibility of such jurisdiction being exercised in the present case. I proceed, of course, on the basis that Mr Ward acted throughout in complete good faith. But the simple fact remains that, by agreeing to provide his services in return for substantial fee the size of which was dependent upon the amount of a successful bid by Guinness, Mr Ward was most plainly putting himself in a position in which his interests were in stark conflict with his duty as a director.

In *Hospital Products Ltd v United States Surgical Corporation & Ors* (1984) 58 ALJR 587, a United States manufacturer (USSC) arranged for B to be its exclusive Australian distributor of its products. B accepted on behalf of a corporation (HPI) controlled by him and an agreement was drawn up. While distribution of the products continued under the agreement as the products of USSC, HPI arranged to manufacture in Australia components of the products and began to defer fulfilment of, and accumulate, orders received. This was done without the knowledge or consent of USSC. After the distributorship had continued for about nine months HPI terminated it by notice to USSC. It thereafter supplied products assembled from its own manufacture in fulfilment of orders, in a manner which was intended to mislead and in fact misled existing companies into believing that the products were being manufactured with the approval of USSC. The case is important for the current purpose not for its facts but for ascertaining who is a fiduciary. The judges of the High Court held unanimously that the Australian party had broken its obligations. There was judgment for the manufacturer against the distributor for damages for breach of contract but the majority of the judges held that having regard in particular to the commercial character of the arrangement between USSC and HPI and their having dealt at arm's length and on an equal footing, HPI did not stand in a fiduciary relationship to USSC, and HPI had not become a fiduciary in respect of the products' goodwill of USSC in the Australian market. Gibbs CJ at p 596 said:

> The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. The archetype of a fiduciary is of course the trustee, but it is recognised by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship

> to one another — for example, partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed. However, the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one. ... I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist.

Gibbs CJ also said at p 598 in relation to an obligation imposed by the rules of equity on a fiduciary, that such a person can defeat a claim to account for profits acquired by reason of his fiduciary position and by reason of the opportunity resulting from it only on the ground that the profits were made with the knowledge and assent of the person to whom the fiduciary obligation was owed: see *Phipps v Boardman* at p 105; and that the equitable rules are exceedingly strict, as the decisions in *Regal (Hastings)* and *Phipps v Boardman* plainly illustrate. He then went on to say that what was attempted in that case was to visit a fraudulent course of conduct and a gross breach of contract with equitable sanctions, that it was not necessary to do so in order to vindicate commercial morality, for the ordinary remedies for damages for fraud and breach of contract were available to USSC although it did not choose to pursue the former, but in any case the equitable doctrines sought to be invoked had no application to the then present circumstances.

By reference to the dictum of Gibbs CJ and the admissions abovestated, the defendants were fiduciaries being either directors or employees of one or other of or both the plaintiffs. That they are undoubtedly fiduciaries is evidenced by their being mentioned as such in the said order of the Federal Court. I do not see by what stretch of imagination *Regal (Hastings) Ltd v Gulliver* or *Phipps v Boardman* cases assist the defendants either on the law or the facts. Here upon the evidence before the court there was no assent or consent to the defendants' conduct, there was no question of the defendants not benefitting from the breach and therefore, on the facts the *Regal (Hastings)* case is distinguished and inapplicable in whole. In the latter case Boardman's conduct was admitted, there was no concealment pointing to misconduct to say the least with no evidence to indicate the contrary.

Returning to the said admissions again it is clear that the work in respect of which the defendants were paid by STMB was done when the defendants were still directors or employees of the plaintiffs and to use the words of Lord Templeman in the *Guinness* case abovestated, there is no question of their being paid for work which they were in any event bound to perform in their capacity as such directors and employees and in this regard it is observed by reference to the account that of the total sum claimed the largest item is for professional fees. Put in another way, they are claiming for themselves personally professional fees of RM197,131 for work done for STMB by the plaintiff companies

through the effort of the companies' directors and employees, which they cannot do. The fact that they were those directors and employees is irrelevant to their personal claim and beside the point. On the contrary it points to a blatant breach of their fiduciary duty.

As to the remainder being the items in the account other than that for professional fees, assuming for the moment that the account is properly before the court, it is not clear whether the facilities including lay staff utilised in earning the amount paid by STMB were the plaintiffs' or the defendants' or partly the plaintiffs' and partly the defendants'. That being the case it seems to me on the authority of *Hospital Products* abovestated, that the defendants should not be able to succeed in their claim for deduction on the basis of the account, with particular reference to the dictum of Mason J at p 614:

> The proposition which I have stated based on the observations of James LJ needs to be modified in order to take account of the situation where the fiduciary has so mixed an indeterminate profit with his own property as to render the identification of the gain impossible. There '... the whole will be treated as trust property, except so far as he may be able to distinguish what is his own': *Brady v Stapleton* (952) 88 CLR 322 at 336, quoting Page Wood VC in *Frith v Cartland* (1865) 2 H & M 417 at 418; 71 ER 525 at 526. The proposition may also need to be modified to take account of a profit acquired by a fraudulent fiduciary through a combination of trust property and his own property or efforts. It may well be that equity in such circumstances will not seek to apportion the gain.

I accepted the argument advanced on behalf of the respondents to the effect that the expenses are inherently unreliable because (a) simple comparison between the periods of the first phase and the second phase shows expenses for the latter period to be much less than for the former period (b) the first defendant himself confirmed that the account was prepared specifically for this litigation but the accountant who admittedly prepared the document was not called to support it and (c) it was also in evidence that the expenses claimed were the entire operational expenses of the defendants particularly for all their work which was not limited to this project although it had to be acknowledged that there was evidence that they commenced work on their other projects only in July 1984 and that the defendants' partnership was set up, inter alia, for the TV3 project. Counsel also referred to the testimony of the third defendant confirming that he received the amount of RM709,218 while he was still the director of the plaintiffs, that he received payment of the sum on 25 January 1984, and that the termination of the services of the defendants took place forthwith as stated in the plaintiffs' letter dated 27 January 1984.

Finally, although the respondents did not question the admissibility in evidence of the account they did at all times question its contents. That being the case it is trite that the appellants had to prove each and every item in the account as not only having been incurred but also reasonably and properly incurred. They did no such thing. They did

not call the maker of the account to testify to its making and the factual basis upon which each item was based not did they, on the assumption that there was such a basis, call anyone to testify to that basis. The only evidence that touched upon the account was that of the first defendant as stated above.

That evidence to my mind did not go even remotely near to the contents of the account being indicative of fees and expenses properly and reasonably incurred or at all. The appellants could do no more than argue that the account should be accepted as fees and expenses so incurred on the basis that it was not challenged and the case of *PP v Abang Abdul Rahman* [1982] 1 MLJ 346 was cited in support of the argument. That case is authority for the proposition that failure to cross-examine a witness on matters disputed amounted to an acceptance of the witness's testimony. I do not see what relevance that proposition can have to the account which no doubt by consent was admitted in evidence without the necessity of its maker being called. As to the contents of the account which were at all times questioned I do not see the proposition as applying to the same particularly in view of the fact that the defendants led no evidence in respect of the items stated therein. Put shortly there was neither witness nor evidence to challenge. The failure to lead evidence of the items was tantamount to the defendants throwing these items at the head of the court and saying, 'This is what I have incurred, I ask you to deduct the amount of these items totalling RM527,747 from the sum of RM709,218 which by order of the Federal Court and admittedly we have to regurgitate and give the plaintiffs no more than RM181,471.' In *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177, 178 Lord Goddard said:

> Plaintiff's must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

That dictum was approved by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17 at p 20 and followed by Edgar Joseph Jr J (as he then was) in *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.

To have required the plaintiffs to challenge mere items hurled at the court in this way was again tantamount to requiring the plaintiffs to set in motion the defendants' idleness in regard to the items thus placing on the plaintiffs the onus of establishing the defendants' claim to deduction. That is something to my mind the defendants could not lawfully do.

Notwithstanding the foregoing the fact remains that counsel for the plaintiffs did challenge the account. The record shows the first defendant in cross-examination admitting to the account being prepared in view of it being submitted in the hearing which was then taking place and being questioned as to certain items of the account including those

as to legal fees and travelling. Then counsel finally in cross-examination put it to the first defendant that the operating expenses set out in the account in particular the professional fees, partners' salary, staff salaries, legal fees, travelling motor vehicle expenses, entertainment could not have been incurred between 1 December 1983–28February 1984. The witness disagreed. It is true that in his re-examination that immediately followed he said that he could not have done all the work with STMB without incurring the expenses as in the account. That simply was not good enough. It amounted to no more than throwing the expenses at the head of the court. The claimed expenses had to be proved. That was not done.

As in the case of the cross-appeal so as to the appeal I cannot in the light of the foregoing see how the appeal can succeed. I therefore dismiss the appeal with costs to be taxed. I also dismiss the cross-appeal with costs to be taxed.

Appeals dismissed.

Reported by Timon Shum